IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

JOHN FRANK TODORICH,
Petitioner.

No. 2 CA-CR 2018-0150-PR
Filed November 14, 2018

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.19(e).

Petition for Review from the Superior Court in Maricopa County
No. CR2013001956001DT
The Honorable John Rea, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

William G. Montgomery, Maricopa County Attorney
By Gerald R. Grant, Deputy County Attorney, Phoenix
Counsel for Respondent

Law Offices of Thomas E. Higgins P.L.L.C., Tucson
By Thomas E. Higgins
Counsel for Petitioner

MEMORANDUM DECISION

Chief Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Staring and Judge Brearcliffe concurred.

E C K E R S T R O M, Chief Judge:

¶1 Petitioner John Todorich seeks review of the trial court's order denying his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. "We will not disturb a trial court's ruling on a petition for post-conviction relief absent a clear abuse of discretion." *State v. Swoopes*, 216 Ariz. 390, ¶ 4 (App. 2007). Todorich has not sustained his burden of establishing such abuse here.

¶2 Pursuant to a plea agreement, Todorich was convicted of transporting persons for prostitution or other immoral purpose, sexual conduct with a minor, child prostitution, attempted child prostitution, attempted luring of a minor for sexual exploitation, and three counts of luring a minor for sexual exploitation. The trial court sentenced him to presumptive, consecutive and concurrent prison terms totaling forty years on seven of the counts and suspended the imposition of sentence and ordered a lifetime term of probation on one of the luring counts, to commence upon Todorich's release from confinement.

¶3 Todorich thereafter sought post-conviction relief, arguing in his petition that he had received ineffective assistance of counsel in that counsel "failed to give [him] the necessary information he needed to make an informed decision" about accepting an October 2015 plea and did not adequately gather and present mitigating evidence for sentencing. He also claimed he was entitled to have the October plea offer reinstated "because no . . . advisement took place" pursuant to *State v. Donald*, 198 Ariz. 406 (App. 2000).[1] The trial court summarily denied relief.

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[1]Todorich also argued counsel was ineffective because she did not request an evaluation pursuant to Rule 11, Ariz. R. Crim. P. But he does not raise that claim on review, and we therefore do not address it. *See State v. Rodriguez*, 227 Ariz. 58, n.4 (App. 2010) (declining to address argument not raised in petition for review).

¶4 On review, Todorich again argues he received ineffective assistance of trial counsel and the plea offer should be reinstated based on the lack of an adequate *Donald* hearing. The purpose of a pretrial *Donald* hearing is to ensure the defendant is aware of a plea offer and the consequences of conviction, and provide a record in the event of a later claim of ineffective assistance of counsel. *See id.* ¶¶ 14, 17. At such a hearing, a formal plea offer, and a defendant's rejection of it, "can be made part of the record" to "help ensure against late, frivolous, or fabricated claims" of ineffective assistance of counsel "after a trial leading to conviction with resulting harsh consequences." *Missouri v. Frye*, 566 U.S. 134, 146-47 (2012). Nothing in *Donald*, however, suggests a pretrial record of a rejected plea agreement is constitutionally required, and Todorich has cited no authority to support his contrary assertion. *See* Ariz. R. Crim. P. 32.9(c)(4)(B)(iv).

¶5 To prevail on his claim of ineffective assistance, Todorich was required to demonstrate both that counsel's performance was deficient and that he was thereby prejudiced. *See Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *State v. Nash*, 143 Ariz. 392, 397 (1985). A defendant may show deficient performance during plea negotiations by proving counsel gave him erroneous advice or "failed to give information necessary to allow [the defendant] to make an informed decision whether to accept the plea." *Donald*, 198 Ariz. 406, ¶ 16. Under *Donald*, "[t]o establish prejudice in the rejection of a plea offer, a defendant must show 'a reasonable probability that, absent his attorney's deficient advice, he would have accepted the plea offer' and declined to go forward to trial." *Id.* ¶ 20 (quoting *People v. Curry*, 687 N.E.2d 877, 888 (Ill. 1997)).

¶6 At a settlement conference in October 2015, the judge who conducted the conference informed Todorich, "[T]he plea offer is 14 to 27 years. The presumptive is 20 years." He went on, "If you go to trial there's mandatory consecutive sentences on two of the counts with a presumptive of 20 years. It would be, 40 years is the presumptive." The judge also told Todorich that the state had "a very strong case" and that "it's tough to mount a defense in these types of cases . . . when young children come in to testify." Todorich questioned the judge about which charges would be included in the plea, and the court told him "some charges are stronger than the others," but indicated that if he were convicted after a trial, given his age, the resulting sentence "would amount to a lifetime." Todorich responded, "I am afraid at my age the plea is also a death sentence." The prosecutor clarified that on counts relating to two other victims, Todorich would face another thirty-four years if convicted. And he explained that

under the plea being offered, all but three counts would be dismissed. The prosecutor also noted that Todorich had "been trying to get the bottom end of the range down to ten years," but that the state would not offer that. The parties agreed to allow Todorich time to consider the plea and to delay the trial, so no firm deadline on the offer was set.

¶7 At a February 2016 conference to continue the trial again, the trial court asked if there was "any value to a settlement conference" before the new trial date. The prosecutor stated that the defense had "submitted a deviation request," which the state had granted, and that the defendant had thereafter "decided that that was not a plea he was interested in." The court informed Todorich that if he wished to seek another settlement conference he should contact his counsel, and Todorich responded, "Okay," without any further comment on the October plea.

¶8 In June 2016, at a settlement conference on the day of trial, the state offered to dismiss the counts as to two of the victims, with no reduction of charges as to the remaining victims. The judge explained that would result in "a possibility of a sentence of 26 years with a probation tail on the other counts." The judge conducting the conference clarified that twenty-six years would be the minimum and that the presumptive sentence was more. The prosecutor elaborated on their previous negotiation, noting that he had "opened up the plea where you could have gotten as low as 13 years. You said you were going to accept that, and then we went in to do it and you didn't accept it." He then explained the state's case in detail. Later in the discussion, Todorich asked about the previous plea and the prosecutor's agreement to "leave the plea open." The prosecutor stated he had made it clear that once they were going to trial he would not "plead[] out a case." The judge also later explained that the presumptive prison term on the most serious counts was twenty years and two would be consecutive. Todorich did not change his plea at the conference, but thereafter entered guilty pleas as outlined above.

¶9 At sentencing, Todorich also addressed the October plea, indicating the judge at the conference had suggested he would get a maximum prison term of seventeen years and noting that his attorney had "felt with the risk assessment we would even get it lower than that." He said, "But at that time I thought that was still a pretty long sentence for a man of my age for what I've done. What I did was wrong, but I hoped and prayed that I'd get another plea."

¶10 On this record, we cannot say the trial court abused its discretion in concluding Todorich's "contention that he rejected earlier plea offers because of ineffective assistance of counsel is contrary to the record." In order to establish a claim of ineffective assistance a defendant must do more than simply contradict what the record plainly shows. *See State v. Jenkins*, 193 Ariz. 115, ¶ 15 (App. 1998) (defendant's claim he was unaware sentence "must be served without possibility of early release" not colorable when "directly contradicted by the record"). As detailed above, nothing in the record suggests Todorich rejected the offered pleas on any basis other than the length of the resulting sentences. He was informed of the sentences he faced and the terms of the agreements offered, and even after the state agreed to a "deviation" from its offer, declined the offer in hopes of a better offer being made.

¶11 Todorich also contends counsel was ineffective in investigating mitigating evidence. But, as the trial court also pointed out, he has not identified any evidence that would have "overcome the very significant aggravating circumstances" that the court found at sentencing. Todorich therefore has not established he was prejudiced.

¶12 For these reasons, although we grant the petition for review, we deny relief.